



ARMY CONTRACTING AGENCY  
NORTHERN REGION HEADQUARTERS

FREEDOM OF INFORMATION ACT (FOIA)  
INSTRUCTIONS FOR INITIAL DENIAL  
AUTHORITY APPROVAL

20 OCTOBER 2003

## **I. INTRODUCTION**

*The Freedom of Information Act (5 U.S.C. §552, as amended) provides that information is to be made available to the public either by (a) Publication in the Federal Register; (b) Providing an opportunity to read and copy records at convenient locations; or (c) Upon request, providing a copy of a reasonably described record.*

*Federal Acquisition Regulation (FAR) Part 5, in part, provides that: Contracting Officers may make available maximum acquisition related information to the public, except information that: (1) Would provide undue or discriminatory advantage to private or personal interests; (2) Received in confidence from an offeror; (3) Otherwise requiring protection under FOIA or the Privacy Act; or (4) Pertaining to internal agency communications.*

*The premise of the Government's policy is that the public has a right to information concerning the activities of its Government. Department of Defense (DOD) policy is to conduct its activities in an open manner and provide the public with a maximum amount of accurate and timely information concerning its activities, consistent always with the legitimate public and private interests of the American people.*

*DOD implementation of FOIA is by DOD 5400.7-R. This regulation is available at: [http://www.dtic.mil/whs/directives/corres/pdf/54007r\\_0998/p54007r.pdf](http://www.dtic.mil/whs/directives/corres/pdf/54007r_0998/p54007r.pdf). Authority for withholding information for exempt material is found in Chapter 3 of the regulation. The Army Regulation is 25-55.*

*This guide provides information on how a copy of the record may either be released or denied in full or in part to the public. It is designed to assist Contracting Officers who receive requests for records that may be exempted from mandatory public disclosure. Procurement related exemptions most often apply to trade secrets, confidential, commercial or financial information, source selection information prior to award, contract proposals that are not otherwise set forth or incorporated by reference in the resultant contract (see 10 U.S.C §2305(g)). If the Contracting Officer concludes that some or all information requested should be denied, he/she must prepare the proposed response in accordance with DOD 5400.7-R. If a no record response meets the request then this is also considered a "denial" and must be forwarded to the IDA for action. Army Contracting Agency (ACA) Head of Contracting Activity (HCA) has delegated IDA authority to each ACA regional Principal Assistant Responsible for Contracting (PARC).*

*The DOD standard is to provide a final response determination within 20 working days as provided for in the FOIA Statute. This statutory response may be satisfied with an interim response providing information on when the requester can reasonably expect either the information or denial of the information.*

*This guide is intended to assist the ACA Contracting Officer when recommending a denial to the IDA of part or all of the information requested by the public (either an*

*individual or vendor request) under the FOIA. Please refer to the DOD Regulation for FOIA program details to include allowable fees for processing FOIA requests.*

*The Army installation FOIA officer will provide administrative processing for the ACA Contracting Office; however, the IDA for acquisition related material remains the regionally assigned ACA PARC. As a point of clarification, if a FOIA is for information that is part of or found in the A-76 Management Study, then the IDA is the Assistant Chief of Staff for Installation Management (ACSIM). The following provides instructions and formats for the documents forwarded for IDA review and approval*

## **II. ACTION UPON RECEIPT OF A FOIA REQUEST**

1. Upon receipt of a FOIA request, the Contracting Officer should determine what records are covered by the request and whether the DOC or another Directorate has custody of the requested records. If another Directorate has custody of part or all of the requested records, the FOIA request should be forwarded to that Directorate for action. The requester should be notified as to which part of his/her request has been forwarded and what Directorate is handling the request.
2. For those requests where there are no records responsive to the request, the DOC will process the request for IDA action as set forth in Section III of the guide.
3. For those requests for records within the DOC's custody, the DOC, in coordination with the installation FOIA officer and local legal counsel, shall make a determination of releasability. If the record is releasable, the DOC shall provide a copy to the requester, subject to the requester complying with the appropriate administrative requirements.
4. In all cases where a requested record contains information that has been provided to the Government from a third party (usually an awardee or an offeror), the DOC shall forward a copy of the request to the third party and ask whether the third party objects to the release of the requested information (see Enclosure 2). The DOC shall not make any release determinations until the third party has had an opportunity to make its objections.
5. Should the third party have no objection to the release, the DOC shall make a release determination as described above. If the third party does not respond to the request or if the third party objects to release but does not provide a detailed basis for the objection, the DOC shall notify the third party and again request a detailed response by a specific date. If nothing more comes from the third party by the specified date, the DOC should make a releasability decision when there has been no response. Where there has been an objection without adequate support, the DOC must do a competitive harm analysis (see Paragraph 7 below).
6. Whenever the DOC determines that all or part of a record is exempt from release, the request package must be forwarded to the PARC for his/her action as the IDA. The procedures for forwarding the package are in Section III.

7. When a third party objects to the release of information the Contracting Officer must perform a competitive harm analysis. IDA approval is required before release of a document where there is an objection to release by the originator of the information at issue. Consequently, such requests, along with the competitive harm analysis, should be forwarded for IDA action as provided for in Section III.

8. Once a releasability determination has been made by the IDA, the DOC will release the documents as determined by the IDA. For those documents where release was objected to by a third party, no release will be made until ten (10) working days after the third party has been notified of the IDA's releasability determination (see Enclosure 3). This will allow the third party time to protect its interests (see Part III, paragraph 2(a)(7)).

### **III. FREEDOM OF INFORMATION ACT (FOIA) INSTRUCTIONS FOR INITIAL DENIAL APPROVAL**

1. The following situations all require IDA action:

a. Where the DOC has made a releasability determination and recommends withholding all or part of the records requested.

b. Where the DOC has determined that no records exist that meet the request.

c. Where the request involves information received from a third party and the third party objects to release of the information. In these cases, the Contracting Officer should have performed a competitive harm analysis.

2. To assist in preparing FOIA requests to be submitted to the Initial Denial Authority (IDA) for review, the following guidance is provided:

a. A DD Form 2086, Record of Freedom of Information (FOI) Processing Cost, and an index should be included on the front of the files, tabbed and arranged as follows:

(1) TAB A. DOC memo to IDA recommending whether to withhold information. The memo shall be signed by the DOC and should state if any information was determined releasable and when that information was provided to the requester. The memo should clearly indicate whether the requested document(s) should be withheld in whole or in part. If the DOC recommends that an entire document be withheld, the cover memo should indicate the basis for the recommendation. If the DOC intends that portions of a document should be withheld (if appropriate, page by page), the basis for each recommended non-release of information must be included.

(2) TAB B. Draft IDA response to requester (see Enclosure 1). The first paragraph should restate each item of requested information.

(3) TAB C. Supporting legal opinion. Before forwarding a FOIA request to the IDA for action, records custodians will obtain an opinion from their servicing judge advocate concerning the releasability of the requested records. The legal opinion must provide the legal basis for the proposed denial or release. It must also indicate concurrence/non-concurrence with the DOC's recommendations at TAB A.

(4) TAB D. Letters notifying the requester and any affected contractor, or third party that the action was forwarded for IDA decision.

(5) TAB E. Cover letter to requester forwarding part of requested information when partial denial is recommended. If the IDA determines requested information should be released then the respective DOC will release the information.

(6) TAB F. Letter from affected contractor regarding its position on the release of any information (or written objections, if any, to disclosure from any other source supplying acquisition information). The Contracting Officer's competitive harm analysis is also included in this tab. Release of current and option year unit prices:

(a) FOIA Exemption 4 protects trade secrets and commercial or financial information that is privileged or confidential. Unit prices are required components of submitters' contract proposals.

(b) Commercial or financial matter is only confidential for purposes of Exemption 4 if disclosure is likely to: (1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the data was obtained.

(c) If competitive harm is alleged by the submitter and the Army's interests will be harmed by disclosure then the Contracting Officer must perform a competitive harm analysis.

(7) TAB G. Letter to affected contractor requesting his opinion concerning release of firm's proposal, to include cost or pricing data, or other commercial, financial, or proprietary data furnished to the Government (Enclosure 2). Releasable portions of proposals must be sent to the affected contractor within a reasonable number of days prior to a specified disclosure date along with a written statement briefly explaining why the affected contractor's objections were sustained (Enclosure 3).

(8) TAB H. FOIA request.

(9) TAB I. Miscellaneous information, when applicable (List).

(10) TAB J. Redacted (withheld information blackened) and unredacted copy of information recommended for denial. When only portions of the document should be withheld, the redacted copies shall clearly reflect the denied information by means of blackened areas, which are sufficiently blackened so as to reveal no information.

Information identified by the DOC as releasable should be forwarded to requester at the time of such determination.

2. For requests involving voluminous documents and multiple deletions of information, the entire document should be renumbered serially in pencil for ease of reference in delineating page numbers for portions of documents that were released or are recommended for withhold.

3. When all required documents are not submitted in accordance with the above, IDA review will be deferred pending their receipt. If additional information is required prior to final IDA determination, the FOIA referral file will be returned to the cognizant DOC/contracting officer for appropriate action.

4. No Record Responses to FOIA Request:

a. In the court case, *Oglesby v. U.S. Department of the Army*, 920 F. 2d 57 (DC Cir 1990), the U.S. Circuit Court for the District of Columbia held that a no-record response to a FOIA request is a denial of the request. As a denial, the FOIA request and response must be sent to the IDA for a decision. DOCs will adhere to the following guidance in preparing a no-record response to a FOIA request.

b. If a DOC receives a FOIA request for which there is no apparent record, the DOC personnel should contact the requester to obtain a more specific description of the requested document, or to determine if the requester will withdraw the request for that document. If the party persists in the request, and no record is found, the individual conducting the search will be required to prepare an affidavit. A sample affidavit is provided at Enclosure 4. The affidavit must explain, in reasonable detail, how the search was conducted, what type of search was conducted, what files were searched, and why the files searched were the most likely to contain the requested records. Merely stating that standard search procedures were used in the record systems most likely to contain the requested documents is not an adequate description of the search. The detail should be sufficient so that the requester can be informed as to the extent and method of the search.

5. DOC FOIA procedures should include coordination of all FOIA requests with the servicing judge advocate and the installation FOIA officer both for those requests which will be forwarded to the IDA for full or partial denial and for those releases made by the DOC.

**SAMPLE LETTER FOR DRAFT IDA RESPONSE TO REQUESTER**

Principal Assistant  
Responsible for Contracting

SUBJECT: Freedom of Information Act (FOIA) Request to Contract (or Solicitation)  
DABX00-00-X-0000

(ADDRESSEE)  
XXXXXXXXXXXXXX  
XXXXXXXXXXXXXX  
XXXXXXXXXXXXXX

Dear:

This is in response to your (insert date of request) request concerning contract DABX00-00-X-0000 under the Freedom of Information Act (FOIA) for the following:

- a.
- b.
- c.

The Director of Contracting at Fort \_\_\_\_\_ has released the documents in subparagraphs \_ and \_ to you. The proposal for subject contract referred to in subparagraph \_ has been referred to this office for my determination as the Initial Denial Authority (IDA) for the Army Contracting Agency (ACA), Northern Region for procurement-related documents.

I determine that the proposal submitted by XYZ Corporation is exempt from disclosure under (insert appropriate FOIA exception from DOD 5400.7-R, DOD Freedom of Information Act Program Regulation).

NOTE: Exceptions commonly used are:

(a) Exemption 3 of FOIA, (5 U.S.C. 552(b)(3)). Those concerning matters that a statute specifically exempts from disclosure by terms that permit no discretion on the issue, or in accordance with criteria established by that statute for withholding or referring to particular types of matters to be withheld. With respect to your request, 5 U.S.C. 552(b)(3) prohibits release of the requested information. Examples of such statutes are: patent secrecy, communication intelligence, procurement integrity, physical protection of nuclear material, protection of contractor submitted proposals.

(b) Exemption 4 of the FOIA, (5 U.S.C. 552(b)(4)). Documents containing trade secrets or commercial or financial information that a DOD Component receives from a person or organization outside the Government with the understanding that the information or record will be retained on a privileged or confidential basis in accordance with the customary handling of such records. Records within the exemption must contain trade secrets, or commercial or financial records, the disclosure of which is likely to cause substantial harm to the competitive position of the source providing the information; impair the Government's ability to obtain necessary information in the future.

(c) Exemption 6 of the FOIA, (5 U.S.C. 552(b)(6)). Information in personnel and medical files, as well as similar personal information in other files, that, if disclosed to a requester, other than the person about whom the information is about, would result in a clearly unwarranted invasion of personal privacy. Release of information about an individual contained in a Privacy Act System of records that would constitute a clearly unwarranted invasion of privacy is prohibited, and could subject the releaser to civil and criminal penalties. An example of other files containing personal information similar to that contained in personnel and medical files includes Government Purchase Card lists.

Your request is (partially) denied. You may appeal this denial to the Secretary of the Army. In the event you decide to appeal, your letter of appeal should be sent within 60 days of the date of this denial letter through the Army Contracting Agency Headquarters, Northern Region, ATTN: SFCA NR, 11 Bernard Road, Fort Monroe, VA 23651-1001 to Freedom of Information Act Appeal, ATTN: SAGO, General Counsel, 104 Army Pentagon, Washington, D.C. 20310-0104. This denial is made on behalf of the Initial Denial Authority, the Assistant Secretary of the Army (Acquisition, Logistics and Technology) by Colonel Steven R. Boshears, Principal Assistant Responsible for Contracting, Army Contracting Agency Headquarters, Northern Region.

Sincerely,

Steven R. Boshears  
Colonel, U.S. Army  
Principal Assistant  
Responsible for Contracting

Encl 1

**SAMPLE LETTER TO AFFECTED CONTRACTOR REQUESTING HARM AND SUPPORT OF HARM SHOULD INFORMATION BE RELEASED**

Directorate of Contracting

SUBJECT: Freedom of Information Act (FOIA) Request to Contract (or Solicitation) No. DABX00-00-X-000

(ADDRESSEE)  
XXXXXXXXXXXX  
XXXXXXXXXXXX  
XXXXXXXXXXXX

Dear:

The Army has received a request under the FOIA concerning Contract No. DABX00-00-X-000 for the purchase of \_\_\_\_\_.

Our review of the requested information reveals that certain data supplied by your firm may fall within Exemption 4 to the FOIA.

Under this exemption, the Army may refuse to disclose trade secrets and commercial or financial information obtained from a source outside the Government and which is privileged or confidential. Commercial or financial information is considered confidential if its disclosure is likely to either impair the Government's ability to obtain necessary information in the future or cause substantial competitive harm to the source of the information.

In order for us to make a determination regarding the release of the information under consideration, the Army must have a detailed justification of the reasons your firm believes the information requested should not be released under Exemption 4 of the FOIA. We believe that you are in the best position to explain the commercial sensitivity of the information contained in the contract which relates to the requested information.

In this regard, please provide this office with a specific description concerning how disclosure of this requested information in the contract would cause substantial harm to your firm. In this regard, please remember that FAR Section 15.506(d)(2) permits the release of unit prices. If we have not heard from you by \_\_\_\_\_, we will assume that your firm has no objection to disclosure of the information in its entirety.

We will carefully consider the justification you provide and will endeavor to protect your proprietary data to the extent permitted under law. Should we disagree with your position regarding some or all of the information requested, and determine it to be

releasable, we will provide you with advance notice of our decision so that you may take whatever steps you consider appropriate to protect your interest.

Sincerely,

KO Signature

Encl 2

**SAMPLE LETTER TO CONTRACTOR WHEN A PORTION OF HIS PROPOSAL IS DISCLOSED**

Directorate of Contracting

SUBJECT: Freedom of Information Act (FOIA) Request for Contract Number

(ADDRESSEE)

XXXXXXXXXX

XXXXXXXXXX

XXXXXXXXXX

Dear:

I have considered your (insert reference to contractor's letter) justification to my letter regarding the release of information contained in contract number \_\_\_\_\_ which relates to the (insert information being requested) from your proposal. I find that some portions of the proposal do not contain confidential commercial information. Copies of these portions are enclosed. In accordance with the FOIA (5 U.S.C. §552) and Executive Order 12600, June 23, 1987, these portions will be released to the requester ten (10) business days from the date of this letter.

Sincerely,

KO Signature

Encl 3

AFFIDAVIT

1. I (Name and Title of Person Conducting Search), certify that I have conducted a search of the records described at paragraph 2, below, using the procedures described at paragraph 3, below, requested by (Name of Requester) under the Freedom of Information Act, 5 USC §552. The aforementioned search did not result in the discovery of any record that matches the record requested by (Name of Requester).

2. Records Searched:

(Describe the records systems searched and why those records systems are the systems most likely to contain the requested documents.)

3. Procedures used to conduct search:

(Describe in detail how the search was conducted, whether automated records were used; if so, what search **terms were** used, and what indexes were searched. If search was conducted by going through records by hand, what documents were examined or inspected? Do not use descriptions such as "all records searched," "standard procedures were used.")

I swear and affirm that the information contained in this affidavit is true, correct and complete to the best of my knowledge.

(TYPED NAME AND SIGNATURE OF PERSON CONDUCTING SEARCH TITLE AND POSITION)

(Name of Person Conducting Search), appeared before me, (Name of Notary), a notary public for the State of \_\_\_\_\_ and duly swore or affirmed that the information contained in this affidavit is true and correct to the best of (his/her) knowledge, and thereafter affixed (his/her) signature to this affidavit.

Notary Public